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RATIONING JUSTICE

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"If we are to keep our democracy, there must be one commandment: Thou shall not ration justice." Learned Hand

THE words of Judge Hand are echoed in other recent pronouncements that call for a wider availability of effective access to the procedures of justice. *Gideon v. Wainwright*[1] and related cases extending the right to counsel in defense of criminal accusation, the legal assistance component of the

[1] Gideon v. Wainwright, 372 U.S. 335 (1963). Gideon v. Wainwright held that counsel must be provided to a defendant charged with a felony who had requested appointment of counsel but who had no means of his own to pay an attorney. It overruled an earlier decision, Betts v. Brady, 316 U.S. 455 (1942), and subsequent cases relying on it, which held that counsel need be provided only where on "an appraisal of the totality of facts in a given case," it appeared that the criminal proceeding would be manifestly unfair if the defendant were obliged to proceed without counsel.

Provision of counsel for indigents can be made through either tax-supported public defender systems, charitably supported legal aid systems, appointment *ad hoc* of private attorneys, or a combination of those procedures. See generally, Silverstein, Defense of the Poor in Criminal Cases in American State Courts (1965). *Gideon* itself was a felony case, but the language and rationale of the decision seem applicable as well to misdemeanor charges. See People v. Witenski, 15 N.Y.2d 392, 259 N.Y.S.2d 412 (1965). In that event, the scope of the problem of providing counsel for indigents is considerably magnified. There are roughly 300,000 felony prosecutions a year nationally; there are about 5,000,000 misdemeanor prosecutions a year nationally. See Silverstein, *op. cit. supra* at 7, 10.

Federal Anti-Poverty Program,[2] the rapid escalation of privately funded legal aid[3] and, in broader terms, the demand for greater accountability and regularity in the administration of public welfare programs themselves,[4] all reflect the concern for lessening the disparity of rich and poor in their procedural position before the law. It is, however, odd to think of these developments as responsible to a commandment that justice *not* be rationed, for in a strict sense they all are the quintessence of rationing: an allocation of resources that departs from the distribution afforded in the marketplace.

The commandment was of course not intended to be taken so literally. But it seems worthwhile to consider some of the implications that follow if the commandment is reformulated in more strictly accurate, if less poetic, terms: thou shall ration justice—but on what terms?

The implications that arise from the question begin with the broad one of providing a system of justice in the first place and extend to subsidiary and more parochial questions about the relation between private and public participation in the doing of justice. The general point to be advanced is that the appropriateness of particular commitments to "fairness" in the administration of justice can be illuminated, if not determined, by assessing the economic choices that are involved. This is not a new point, but it is one worth some reconsideration, especially in the light of the intensifying common interest in the problem.

It should be recognized at the outset that an administered legal system is itself a social welfare program. The act of government represents the erection of a framework of rules and supporting policies that call for alterations in community behavior patterns in the name of the common good. The point is put formally, for example, in the preamble of the United States Constitution: "In order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty . . .". The same point is implicit in the establishment and maintenance of any government. An essential step of implementation in societies more complex than the most primitive is the creation of an apparatus of administered legal justice—keepers of the peace such as police, judges and jailers, and, in modern systems, complex adminis-

[2] Shriver, The OEO and Legal Services, 51 A.B.A.J. 1064 (1965); Berry, The Role of the Federal Government—National Conference on Law and Poverty, 51 A.B.A.J. 746 (1965); Wald, Law and Poverty: 1965; Working Paper for the National Conference on Law and Poverty (1965).

[3] See Statistics of Legal Aid Work in the United States and Canada, published annually in National Legal Aid and Defender Association, Summary of Conference Proceedings.

[4] See Reich, Midnight Welfare Searches and the Social Security Act, 72 Yale L.J. 1347 (1963); *cf.* Cahn and Cahn, The War on Poverty: a Civilian Perspective, 73 Yale L.J. 1317 (1964).

trative and judicial systems with a supporting cast of thousands of public functionaries.

To have a system of law and administered justice presupposes that there has been a practically effective political monopolization of internal force, an assumption of final legitimate authority in specially designated officials, and a delegation within the legal framework of specialized functions of law-making, law enforcement and adjudication. These arrangements have not only political, ethical and social elements—the subject of political theory and legal philosophy—but economic ones as well. In the crudest sense, to the extent the system of justice is effective, it supplants expenditure for domestic fortification, armed guards and an apparatus of precaution with expenditure for more pacific private purposes and for the apparatus of official justice. Refinement in the concept of administered justice requires further allocations, dictated by parallel estimates of common expediency.

Whatever else it is, creation of a system of justice is an expression of collective economic choice to alter the situation that would otherwise result from the exercise of unregulated choices. From a political point of view, reasonably decent and effective administration is a primary consideration of government because the adjacent political processes are turmoil and rebellion. Hence, it may be said that reasonably decent and effective administration of justice is an irreducibly necessary social service and therefore outside the ordinary calculus of economic choices. But the fact that a reasonably decent and effective system of justice is a political and social necessity does not detract from the fact that economically it is a commitment of collective resources to a program whose special object is the peaceful protection of life, limb and possessions. In its objectives, organization and cost consequences, a system of administered justice is thus a social welfare program in substantially the same sense as the modern refinements of social security, health insurance and public education are social welfare programs.

Moreover, whatever the minimum political requirements in the way of a system of justice may be, it seems quite clear that systems of justice can be developed upward from that minimum to various "service" levels. Put another way, "reasonably decent and effective administration of justice" admits of a wide range of possibility and expectation, depending on the collective preference for public order and individual justice as compared with the achievement of other objectives. The service level in the administration of justice can be established by economic calculation essentially similar to the calculation involved in establishing any other public welfare program: how badly do we want well-trained judges in all courts, jury trial for parking tickets, policemen in every subway station, street lights on every corner?

It is thus apparent that justice can be "bought" in the sense that different

measures of the service of administered justice can be obtained depending on the price that is paid. In ethical and legal discussion, "justice" in adjudication is sometimes spoken of as though it were an impalpable or an absolute. In operational terms, which is to say economic terms, it is surely not. In the doing of justice, as elsewhere, what can be obtained is limited by what can be funded. And if it is true that no amount of money can buy perfect juridical insight, it is clear enough that approximations of perfection in an organized social structure are possible only with substantial expenditure. Hence, all decisions about the measure of justice that should be accorded in the system are also decisions about public expenditure.

A second implication is that decisions about the desired level of service in the public welfare program of administered justice are economically competitive with decisions to engage in other types of public welfare programs. This is perfectly plain in the case of a city council's decision whether to add to the police department at the expense of the recreation department's budget, and it is no less true, if less directly perceptible, in the wider dimension of the national economy. Hence, administered justice is a commodity for which differential preference has to be established by comparison with other possibilities. This is particularly the case, and the importance of calculation of alternatives more pressing, when the alternatives include public welfare programs whose general objectives include those that are among the aims of the system of administered justice itself. For example, more public recreation facilities may diminish propensity to criminal recreation, which in turn diminishes the required service level of police, judges and jailers; broadening social accident insurance may reduce the number and difficulty of tort claims, and thereby reduce the need for claims adjusters, lawyers and juries, and so on.

The fact that these differential cost calculations are exceedingly hard to make with precision does not alter the fact that such calculations are necessary, or the fact that they are made every day, or the fact that they constitute rationing of justice. Nor does the fact that the expression of preferences represents a pluralist and diffuse decisional process, involving the courts, the legislatures and the taxpayers, alter the fact that collectively decisions are made to stand any given moment of time. Just this sort of calculation is being made in the Federal Anti-Poverty Program, where a finite budget has to be allocated among educational programs, medical services, family counseling and legal services. It is, moreover, in part a recognition of these cost implications, and the relinquishment of other goals that is required as a result, that underlies the anxiety and hostility expressed in some quarters concerning the extensions of Due Process by the Supreme Court. Due Process, a procedural aspect of adjudication and preadjudication, costs money that could plausibly be spent otherwise.

At stake is the ration of justice as compared to the ration of other things. This question has been at issue all along, for the *status quo ante* itself represented a scheme of choices. The differences that have been introduced by such developments as *Gideon v. Wainwright*,[5] the stepping up of legal aid services for the poor and the Anti-Poverty Program are twofold. First, the prior rationing system has been drawn into serious dispute by elements in the community whose voices have to be heeded, so that the questiton is not so easily put aside. Second, the scale of resource reallocation required to meet the new demands is so large that the economic dimension of the question has become a matter of real political concern, and not merely financially *de minimis*. The day of political and economic reckoning is not coming; it is already here.

The particular terms of reckoning are beyond the scope and purpose of this paper, but a few points may be mentioned. The first is suggested by calling to mind the aphorism that medieval justice was political rigor tempered by administrative inefficiency. In modern times, administrative techniques, especially in areas relevant to the criminal law, have remarkably increased in their efficiency: record-keeping generally, systems of property identification, professional police, photography and telephony, ballistics, finger-printing, and like methods have all been developed, and invested in heavily by the public, since the beginning of the 19th century. Parallel development is found in areas of inter-personal dispute, such as contracts (writing, recordation), torts (collision reconstruction), and property conflicts (surveying, handwriting analysis). By and large, there has been over the same historical period no diminution in the will to control private behavior. If anything, the trend has been the other way: gambling, the use of narcotics and alcohol, dissemination of fraudulent and obscene literature, and trade and fiscal adventurism were not generally criminal before the modern era. On the civil side, our concept of wrong in contract, tort and property shows similar refinement.

The improvement of law-enforcement and adjudicative techniques and the simultaneous expansion of the area of their employment represent an enormous increase in investment in favor of inducing conforming behavior. Certainly it far surpasses in sophistication and cost the modest apparatus of Elizabethan justice. Most of this is occasioned by the social necessities arising from living more complex lives, in closer quarters and at a more rapid pace of interchange. These tendencies seem to be strengthening in recent times, if the demand for lawyers and the supply of new regulations are indications. It seems fairly clear, therefore, that we are in a secular trend of rising investment in administered justice, of which the largest part has been invested on the side of regulatory administration. In this view, it should not be surprising to

[5] See footnote 1, *supra*.

see demands for parallel investment in behalf of those unable to marshal their own resources to the level currently available to most elements in society. The crude balance approximating equality before the law that is essential for political stability in modern society could not be maintained otherwise.

The second point is related to the first but is somewhat more difficult to make. If one could imagine a society in which administrative perfection had been so far achieved that for practical purposes all who were officially accused could be safely regarded as guilty, it is difficult to imagine how such a society could be free in any sense of the word. This would be so unless it were also assumed that a society approximating such administrative perfection were also content to limit its intrusions into private affairs to rigorously confined areas of concern, so that the apparatus of administration touched individuals only infrequently. This assumption seems wildly improbable, however, if only because technical efficiency has a normative ethic of its own which tends to inflate into substantive regulation by a slow but relentless Parkinsonian process. In any event, the modern trend seems to be toward constant filling of the gap between conduct which is within the reach of regulatory technique and that which is actually regulated. This is as notable in the criminal law as it is in civil relationships.

The most recent introduction of additional investment in the system of administered justice has been largely on the defensive side, in the form of criminal defense and civil aid. This new rationing can be considered a redress of the balance of government toward reducing its effectiveness, counterposing increases in government's administrative effciency with obstacles to its success. As Mr. Justice Black observed in *Gideon v. Wainwright*:

> Governments, both state and federal, quite properly spend vast sums of money to establish machinery to try defendants accused of crime. Lawyers to prosecute are everywhere deemed essential to protect the public's interest in an orderly society . . . That government hires lawyers to prosecute and defendants who have the money hire lawyers to defend are the strongest indications of the widespread belief that lawyers in criminal courts are necessities, not luxuries . . . [The] noble ideal [in which every defendant stands equal before the law] cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him.[6]

Parallel counterpositions have occurred in earlier periods of history, balancing seditious libel with jury trial, public prosecutors with public defenders, and prohibition with inadequate police. In any case, the new rationing of justice, at still higher levels of technical efficiency on both sides than in the past, can be regarded as an effort to redress an imbalance which in righteous

[6] 372 U.S. at 344.

moments is too easily ignored: the social latitude that follows from having much misbehavior remain unpunished.

The current debate over police and prosecution practices, and over extension of legal assistance to the poor in civil matters, is a debate over the system of rationing administered justice. One of the issues unresolved, and generally undiscussed in that debate, is the extent and character of present need for an effective regulatory regime.[7] It is agreed on most sides that a substantial increase in the effectiveness of measures to prevent street violence, robbery, burglary and other unambiguously criminal conduct is desirable. It is not agreed, however, whether there should be more restrictive control of civil demonstrations and civil disobedience, particularly activities associated with the Civil Rights movement. Nor is there agreement in inner critical circles concerning the propriety and efficacy of attempting to maintain controls on narcotics use, gambling and other conduct which can be viewed as wrong only because the law makes it so. Finally, there is not agreement concerning the present and potential administrative capability of law enforcement agencies. Some courts and some commentators see the law enforcement apparatus as relatively powerful and capable of being effective despite introduction of procedural inhibitions that would make achievement of its enforcement objectives more complicated and therefore more expensive. Law enforcement officials, on the contrary, see themselves as under-manned and under-equipped and confronted with an ever-rising tide of responsibilities with which they see no way to cope effectively. And shadowing all the areas of disagreement are the unstated contrary views about the appropriate level and range of conformity to law that should be established in the community.

This debate involves exceedingly complicated issues at best, but it is further confused by three collateral factors. In the first place, the debate proceeds in a multitude of forums—courts, legislatures, law enforcement groups, and the academies—with most of the participants talking past each other rather than joining issues. Second, the state of information about the efficacy of various investments in law enforcement and regulatory administration on the one hand, and measures of constraint and defense on the other, is appallingly meagre.[8] Hence, even if issues were joined there would be little in the way of satisfying evidence that could be adduced. This state of ignorance is being remedied to some extent, but it is also being perpetrated by reliance on all sides on pronouncements that are more fervently held than the available evidence warrants.

Finally, the debate is confused by the failure to put the issues in economic

[7] Packer, Two Models of the Criminal Process, 113 U. Pa. L. Rev. 1 (1964).

[8] *Cf.* Space-General Corporation, Prevention and Control of Crime and Delinquency, Prepared for Youth and Adult Corrections Agency, State of California, Final Report (1965).

terms, to consider the cost consequences against the value added in effectiveness of various methods of dealing with particular problems. The following may be illustrative:

1. It is possible, and for rational analysis essential, to consider alternative "service" levels that might be established for procedural processes in the administration of justice. For example, the problem of equalizing the procedural position of the indigent criminal accused was resolved in *Gideon v. Wainwright* by providing the defendant with counsel to balance the counsel for the state. A theoretical alternative would be to withdraw counsel for the state, which would result in a similar procedural parity but at perhaps less cost. This alternative seems clearly plausible in parking violations and quite possibly could be considered in regard to some more serious offenses. There is no *a priori* reason why a reduced level of adjudicative "service," so long as it maintained reasonable balance between prosecution and defense, would not be as justifiable as a higher service level. Does every public school class "require" a teacher-student ratio of 1:25, or 1:40, or 1:1? Similar questions can cogently and profitably be put concerning a wide range of judicial and administrative processes.

2. It is possible, and similarly essential, to consider the implications for substantive legal policy that ensue from the decisions made concerning the procedural "service" level that is to be established. If it is determined that a given level of procedural refinement ought to be adopted, and if it is further decided that the cost of providing service at that level on a general basis is prohibitive, then it might be concluded that the law enforcement objective to which the particular procedural process is related ought to be abandoned. In short, insufficiency of means may require abandonment of the end—as it does in any simple problem of economic choice.

For example, it has been postulated by the Supreme Court, for what can be assumed are justifiable and sufficient reasons, that illegally obtained evidence may not be used in the prosecution of criminal offenses.[9] This rule establishes a legal minimum on the procedural refinement that must be observed in enforcing criminal law. It requires that the police, in obtaining evidence on which to base prosecution, do so by processes more punctillious than dragnet searches. To use such other methods—preliminary surveillance, specification of the objects to be searched for and justification of proposed searches before a magistrate—takes more time and therefore requires more money per case.[10]

[9] Mapp v. Ohio, 367 U.S. 643 (1961), holding that evidence obtained by illegal search and seizure—neither with a search warrant nor upon a search properly an incident of a lawful arrest—is inadmissible in evidence in a subsequent prosecution. See Traynor, Mapp v. Ohio at Large in The Fifty States, 1962 Duke L.J. 319 (1962).

[10] *Cf.* Specter, Mapp v. Ohio: Pandora's Problems for the Prosecutor, 111 U. Pa. L. Rev. 4 (1962) "The community pays a high price in less effective law enforcement by elevating the right of privacy over the police power" p. 45.

Because the procedural refinements also have the effect of thwarting search efforts which the police might otherwise undertake, they also have the likely effect of reducing the percentage of search success that the police will achieve on the average. This is most clearly the case regarding "victimless" crimes, such as gambling, vice and narcotics offenses, where there is no party to the offense who is interested in reporting it to the police.

The result may be—many police believe the result is— that within the foreseeably available limits of police forces and the presently applicable procedural rules, it is possible only to have sporadic enforcement of certain criminal laws, such as those against gambling. If this is true, and if neither available police forces nor procedural rules are changed, the question arises whether sporadic enforcement of the particular law is a worthwhile objective. Sporadic enforcement of the anti-gambling laws means, among other things, that gambling is not being effectively suppressed even though that is the laws' ostensible object. It means also that application of the anti-gambling laws is haphazardly distributed among the gamblers, a *de facto* inequality that may approximate pure arbitrariness. At the latter point, where we may now be, it is not clear what is achieved by continuing to make gambling a crime.

The problem of search and seizure in the enforcement of anti-gambling and other laws has been thrown into a state of acute tension of late. The police are expected, by themselves and to a lesser extent by the public, to enforce not only gambling and narcotics violations that they can see but also those which they "know about." At the same time, the police are expected, by the courts and to a lesser extent by the public, to keep their enforcement within the procedural limits prescribed by the Supreme Court. If the question were put in the terms suggested here, the tension, if not the gambling, could be reduced and the wisdom of trying to repress gambling drawn into straightforward discussion.

3. The reassessment of procedural service levels, and the reassessment of substantive legal policy that may in turn thereby be invited, taken together may raise further questions about more general questions of public policy. This kind of ramification is suggested by a problem that has recently attracted attention in regard to the program of Aid to Needy Families (Aid to Dependent Children, or ADC, as it was formerly known).[11] This program, commonly called "welfare," provides public cash assistance to certain families "in need," that is, those whose income sources fall below scheduled levels.

Among the questions that arise in determining need is whether the family seeking public assistance has its own sources of income, for if such sources exceed the scheduled minimum, then the family is ineligible for assistance. The most common source of such income is presumably wages earned by the adults in the family, and specifically the father or male standing *in loco*

[11] See 42 U.S.C. §§ 601-609.

paternus in the family. The first question in determining eligibility for welfare assistance is therefore whether there is such a wage-earner who is in fact contributing to the family income, or in the vernacular of public assistance administration, whether there is a "man in the house."

It is obviously to the interest of the welfare recipient that it not be discovered that there is a "man in the house," and a nocturnal pattern of family life may develop as a consequence. It is also obviously to the interest of welfare administrators, under the impulse of pressure from appropriations authorities, to discover whether there is a "man in the house," whose presence raises the inference of income and therefore the consequence of ineligibility for public assistance. The convergence of these patterns of behavior is the so-called "midnight raid" by welfare investigators, an unannounced inspection of the assistance recipient's abode in the dead of night or at the hour of dawn.

It has been suggested, with what seems persuasive force, that the midnight raid is a legally invalid procedure, for reasons substantially parallel to those applied to searches and seizures.[12] If this procedure is invalid, it seems quite probable that enforcement of the substantive legal rule, that is, the eligibility requirement, is unenforceable at acceptable levels of administrative cost. And if it is economically infeasible to enforce the eligibility requirement, it follows that a social welfare assistance program predicated on a concept of eligibility is itself drawn into question. It may be, that is to say, that once the ration of procedural justice is changed, however good the reasons, that the rationing system of general income itself will have to be materially changed. The issue thus presented is of course not unique. The same line of analysis applies *mutatis mutandis*, for example, to such problems as the income tax law: we do not tax most types of "imputed income" for what in the end are reasons of procedural decency and economy.

These illustrations may be multiplied. Common to them, and to all problems in the administration of justice, is that achieving effectiveness of substantive regulatory compliance by the citizenry and achieving procedural regulatory compliance by administrative officials are both expensive processes. They are, moreover, calculable expenses and within broad political limits ones that may be substituted for each other at various levels of preference. They are also susceptible of substitution in favor of other types of expenditure —for parks, housing and television sets. The question of rationing remains.

[12] See Reich, *supra* note 4.